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Supreme Court, U. S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1972

72-578

In Re:

BRUCE W. BUBLICK, A Witness Before The July, 1972 Grand Jury

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Bruce W. Bublick prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinion Below

The United States District Court For The Northern District of Illinois did not render a written opinion. The judgment order of contempt and commitment of the Court is printed in Appendix 1. The opinion of the United States Court of Appeals for the Seventh Circuit, unreported, is printed in Appendix 2.

Jurisdiction

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on September 8, 1972, and the mandate issued on the same date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

The question presented to this Court is whether the Fifth Amendment privilege against self-incrimination which would otherwise protect an attorney in declining to produce documents relating to the attorney's private law practice, is lost solely because the attorney's law practice has been organized as a professional service corporation formed under the Illinois Professional Service Corporation Act (Ill. Rev. Stat. 1971, ch. 32, §415 et seq.), and subject to the requirements of Illinois Supreme Court Rule 721 (Ill. Rev. Stat. 1971, ch. 110A, §721).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides in part that:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . .".

The Illinois Professional Service Corporation Act (Ill. Rev. Stat. 1971, ch. 32 §415 et seq.), and Illinois Supreme Court Rule 721, (Ill. Rev. Stat. 1971, ch. 110A §721) are set forth in Appendices 3 and 4 of this petition.

Statement of the Case

This case involves a proceeding by the United States Government to enforce a *subpoena duces tecum* issued by the July, 1972 Grand Jury in the Northern District of Illinois addressed to Bruce W. Bublick, Ltd. or any authorized officer or agent. The subpoena, set forth in Appendix 5, calls for the production of "corporate minute books, bank statements, cancelled checks, deposit slips and check ledgers for the period from April 30, 1970 to and including the present."

Bruce W. Bublick, Ltd. is a professional corporation organized under the Illinois Professional Service Corporation Act. (Ill. Rev. Stat. 1971, ch. 32 § 415 et seq.) The articles of incorporation were introduced into evidence by the government on the motion to compel compliance. It was stipulated at the hearing in the District Court that petitioner Bruce W. Bublick is the sole incorporator, director and shareholder of Bruce W. Bublick, Ltd. Mr. Bublick is an attorney who has been licensed to practice law in Illinois since 1964. The documents subpoenaed are nothing more than the personal records of Bruce Bublick as a sole practitioner of law.

On August 29, 1972, Mr. Bublick appeared before the July, 1972 Grand Jury in response to the *subpoena duces tecum*. When called upon to produce the material requested in the subpoena, Mr. Bublick declined on the ground that coerced production of the documents would violate his Fifth Amendment privilege against self incrimination.

Immediately upon the refusal of Mr. Bublick to produce the documents called for in the subpoena, the government sought an order by the United States District Court for the Northern District of Illinois compelling produc-

tion of the documents. The Honorable Julius J. Hoffman heard oral arguments and took evidence on the question. The government argued that Mr. Bublick should be ordered to produce because the documents are property of the corporation and hence are not protected by the privilege against self incrimination. The government cited cases holding that the Fifth Amendment privilege does not apply to business corporations.

Petitioner argued that the records in question were records of his law practice which are "his personal records and do not constitute corporate records" within the meaning of the Fifth Amendment privilege against self-incrimination simply because his law practice has been incorporated under the Illinois Professional Service Corporation Act. Petitioner pointed out that the recently created device of a professional service corporation is very different from the usual business corporation. He argued that professional service corporations were created to provide lawyers, doctors and other professional persons with tax benefits under the federal tax laws, while retaining the private and personal nature of the services performed.

Both parties agreed that this is an issue of first impression, and that they could find no cases on the applicability of the Fifth Amendment to the records of professional service corporations.

On August 31, 1972, Judge Hoffman ruled that the documents called for in the subpoena are not protected by the privilege against self incrimination and must be produced. The District Judge entered an order directing Mr. Bublick to produce the documents called for in the *subpoena duces tecum*.

Mr. Bublick was then taken before the grand jury and called upon to produce the documents pursuant to Judge Hoffman's order. Mr. Bublick produced the corporate minute book, but reasserted his Fifth Amendment rights in refusing to produce any other documents. He stated that all of the other documents called for are records of his private practice of law.

The government then brought Mr. Bublick before Judge Hoffman on a motion that he be held in contempt for his failure to produce. After hearing argument, Judge Hoffman held Mr. Bublick in contempt of court, and ordered Mr. Bublick into the custody of the United States Marshal until such time as he produced the documents or until the life of the July, 1972 Grand Jury expired.

Counsel for Mr. Bublick requested Judge Hoffman to set reasonable bail pending appeal. Judge Hoffman refused to grant bail and ordered Mr. Bublick into immediate custody. A request for a stay pending presentation of a motion for bond pending appeal to the Court of Appeals for the Seventh Circuit was also denied by Judge Hoffman. Mr. Bublick was taken into custody by the United States Marshal but was released a few hours later under an order of the Court of Appeals staying the order of contempt until further order of court. The parties thereupon submitted short memoranda to the Court of Appeals on the issue of whether Mr. Bublick should be released on bail pending appeal.

On September 8, 1972, without receiving briefs on the merits and without hearing oral argument, the Court of Appeals entered a two page order disposing of the case on the merits. The Court held that the privilege against

self incrimination cannot be asserted by Bruce W. Bublick, Ltd. The Court of Appeals did not follow the customary 21 day rule for issuing mandates (Rule 41 Federal Rules of Appellate Procedure) but ordered that the mandate issue forthwith.

The government promptly demanded that Mr. Bublick surrender to the United States Marshal to begin to serve his sentence under the contempt citation.

On September 11, 1972, Mr. Bublick appeared before the July 1972 Grand Jury under compulsion of the foregoing orders and produced the documents called for by the *subpoena duces tecum*. Before doing so, Mr. Bublick explained that he did not waive his rights under the Fourth and Fifth Amendments to the United States Constitution, and that he complied only because failure to do so would subject him to immediate and prolonged incarceration.

REASONS FOR GRANTING CERTIORARI

This case involves the availability of the privilege against self incrimination to the sole incorporator, director and shareholder of a professional service corporation. The case presents a question of first impression on an issue of vital importance to all professional service corporations throughout the nation. According to a 1970 survey of the American Bar Association there were 1093 lawyers practicing law as professional corporations in the United States. Lawyers World 24-25 (Nov-Dec 1970) This number has no doubt increased since 1970. In the last few years a vast majority of states have passed statutes to allow the formation of professional corporations. These statutes are designed to allow professionals to obtain equal federal tax treatment with other types of corporations while maintaining the highly private and personal nature of their professional services. The ruling of the Court of Appeals in this case affect lawyers, physicians, dentists, veterinarians, accountants, architects and other professions which can be incorporated under state professional service corporation acts. This Court should speak on the important issue of when the privilege against self incrimination applies to the records of professional people who have organized under these statutes. The lower state and federal courts throughout the nation need guidance from this Court on this important question.

I.

A NOVEL QUESTION OF NATIONWIDE IMPORTANCE IS PRESENTED CONCERNING THE RIGHT OF A LAWYER WHO INCORPORATES UNDER A STATE PROFESSIONAL SERVICE CORPORATION STATUTE TO ASSERT THE PRIVILEGE AGAINST SELF INCRIMINATION.

Almost sixty years ago this Court held that the privilege against self incrimination cannot be asserted by the sole shareholder of a business corporation in order to avoid disclosure of corporate records. *Grant* v. *United States*, 227 U.S. 74, 76 (1913). The *Grant* case was preceded by this Court's decision in *Hale* v. *Henkle*, 201 U.S. 43, 70 (1906) holding that the Fifth Amendment is not available to multi-owner business corporations.

In 1944 in a case involving an unincorporated labor association, this Court formulated a flexible test for determining whether the privilege can be asserted by state-created entities. In *United States* v. *White*, 322 U.S. 694 (1944) this court held, that courts should look to substance rather than form in determining whether the privilege applies. The Court said (at 701):

> "The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."

The issue presented in the case at bar, involving a professional service corporation, has never been examined by this Court. This case involves not only

a sole shareholder, but also a single officer and director—the sole practitioner who incorporated under a special state statute designed to afford equality of tax treatment to professionals. Note, Professional Corporations: Analysis Under the Tax Reform Act And Survey of State Statutes, 58 Geo. L. Rev. 487 (1970); Hanson, Professional Corporations, 59 Ill. B.J. 196 (1970).

More importantly, the state statutes which authorize professionals to incorporate have established an entirely new and unique kind of entity, drastically different from the common commercial corporation. In Illinois, there are fundamental differences between corporations formed under the Illinois Professional Service Corporation Act (Ill. Rev. Stat. 1971 ch. 32, §§415-1 to 415-17), and those formed under the Illinois Business Corporation Act (Ill. Rev. Stat. 1971 ch. 32, §§157.1 to 157.166). The stock of a professional service corporation cannot be sold publicly, nor may it be sold privately to anyone not holding the requisite professional status. (Ill. Rev. Stat. 1971 ch. 32, §415-11). The professional shareholder does not enjoy limited liability (Ill. Rev. Stat. 1971 ch. 32, §415-8), one of the basic benefits accorded commercial corporations.

To govern attorneys who incorporate under the Illinois statute, the Illinois Supreme Court has adopted a special rule (Ill. Rev. Stat. 1971 ch. 110A, §721), providing that only attorneys licensed in Illinois may be shareholders, officers or directors; that the corporation is subject to "the standards of professional conduct applicable to attorneys licensed by this Court" and that:

> (b) This rule does not diminish or change the obligation of each attorney engaged in the practice of law in behalf of the corporation or association to conduct himself in accordance with the standards of professional conduct applicable to attorneys licensed by this court. Any attorney who by act or omission causes the

> corporation or association to act in a way which violates standards of professional conduct, including any provision of this rule, is personally responsible for such act or omission and is subject to discipline therefor. Any violation of this rule by the corporation or association is a ground for the court to terminate or suspend the right of the corporation or association to practice law or otherwise to discipline it.

The rule also provides that ". . . Nothing in this rule modifies the attorney-client privilege." Thus, the *personal* aspect of the practice of law, and the attorney-client relationship, are carefully preserved. Any attorney practicing law under the Act does so as an individual with respect to his clients, and not as a corporate officer, director or employee in the commercial sense. The attorney maintains his individual status and cannot take advantage of the corporate structure to avoid liability or adherence to the Code of Professional Ethics.

The Rule also provides that before the corporation may engage in the practice of law, the shareholders must obtain a certificate of registration issued by the Illinois Supreme Court. The certificate must be obtained annually and is non-assignable. The Rule provides further:

> "(d) The articles of incorporation or association shall provide and the shareholders of the corporation or members of the association shall be deemed to agree by virtue of becoming shareholders or members that all shareholders or members shall be jointly and severally liable for the acts, errors and omissions of the shareholders or members and other employees of the corporation or association arising out of the performance of professional services by the corporation or association while they are shareholders or members."

Judged by the *White* test, it is clear that petitioner is entitled to claim the protection of the Fifth Amendment

privilege with respect to the records of his law practice. The "corporation", Bruce Bublick Ltd., embodies and represents only Mr. Bublick's interests; there are no "common or group interests" involved (*United States* v. *White*, 322 U.S. at 701) which cause the privilege to be lost. After incorporation, as before, the petitioner has engaged in the practice of law as a sole practitioner.

Whatever may be the eventual resolution of this issue by this Court, we submit that the question is one of undoubted nationwide importance and concern, which warrants prompt review by this Court. Thousands of professional men and women throughout the country who have taken advantage of state statutes such as Illinois' are affected by the ruling of the courts below. They are entitled to know at the earliest time whether by incorporating they have forfeited a right accorded by the United States Constitution to all citizens, including attorneys (*cf. Spevak* v. *Klein*, 385 U.S. 511 (1967)), and to many state-created entities.

II.

THIS CASE IS NOT MOOT.

After the Seventh Circuit Court of Appeals affirmed petitioner's contempt conviction and commitment and ordered the mandate to issue forthwith, petitioner, under compulsion of immediate incarceration, produced the subpoenaed documents while reasserting his rights under the Fifth Amendment. As a result, the nature of some of the relief which petitioner requires has been altered, and the question arises whether petitioner's constitutional claim has been rendered moot. In fact, the controversy has not abated, and though its procedural posture has changed, the case is clearly not moot. Nevertheless, it is appropriate to raise and discuss the mootness issue *sua sponte*.

The question of mootness arises in federal cases under the constitutional provision requiring a case or controversy in all judicial matters. Art. III, U.S. Const. If the controversy between the parties has been resolved and the parties are no longer adverse to each other, the case is considered moot. Wright, Federal Courts 33-44 (1963). However if there is a continuing controversy between the parties, the case is not moot merely because a change in circumstances occurred between the time the case arose and the time the case was to be decided. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937).

In the instant situation, the case is not moot for two reasons. First, petitioner stands convicted of contempt of court. Conviction of contempt under the Omnibus Crime Control Act 28 U.S.C. §1826 especially for a lawyer, carries with it continuing consequences which petitioner is entitled to have removed if the conviction was improper even though he is no longer incarcerated. *Sibron* v. *New York,* 392 U.S. 40 (1968).

As the Court said in *Sibron* (at 55):

> "The Court thus acknowledged the obvious fact that most criminal convictions do in fact entail adverse legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.'"

Secondly, there is a continuing controversy between the petitioner, Bruce Bublick, and the government concerning the use of the documents involved in this case. By producing the documents under compulsion, petitioner did not waive his Fifth Amendment rights. He can reassert his

Fifth Amendment privilege if the government attempts to use the documents, or any fruits of the documents, at a criminal trial. *United States* v. *Ryan*, 402 U.S. 530, 532 N. 3 (1971); *United States* v. *Blue*, 384 U.S. 251, 255 (1966). By the same token, he could move to suppress the use of these illegally seized documents before the July 1972 Grand Jury. *Gelbard* v. *United States*, 92 S. Ct. 2357, 2366-67 (1972); *People* v. *Maslowsky*, 34 Ill. 2d 456, 216 N.E.2d 669 (1966).

The return of a wrongfully obtained indictment is itself a wrong which the courts can and should avoid, and where the court can determine that wrongfully obtained evidence or procedures are being used before the Grand Jury it should move promptly to avoid the wrong. *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947); *People* v. *Sears*, 49 Ill. 2d 14, 273 N.E. 2d 380 (1971).

Under the peculiar circumstances of this case, the controversy can only be resolved in an appropriate way by this Court taking the case now. In light of the ruling of the Seventh Circuit the filing of a new case in the District Court to suppress the use of the documents before the Grand Jury would be a useless act, since the Chief Judge of the District Court will necessarily follow the erroneous decision of the Seventh Circuit. An appeal from a ruling denying the motion to suppress would likewise be useless since the Seventh Circuit would merely reaffirm the position it has already expressed.

This Court should not require petitioner to waste the time of the District Court and Court of Appeals in useless procedural maneuvers solely to "reestablish" a controversy which in fact still exists and will continue to exist until decided by this Court. The Court is entitled to treat the matter now as involving a request to suppress the im-

properly seized documents and prevent their use before the Grand Jury or otherwise.

Such a procedure is not novel. For instance, in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) this Court granted relief to the petitioners based on the facts of the case as they stood at the time the Court rendered its decision rather than on the basis of the facts as they stood when the case was decided by the District Court. There was a substantial change in circumstances.

The *Dombrowski* case originated as a suit to enjoin the threatened indictment of the plaintiffs under the Louisiana sedition laws. The District Court denied relief. *Dombrowski* v. *Pfister*, 227 F. Supp. 556 (E.D. La. 1964). The plaintiffs appealed.

While the case was pending in this Court, a state grand jury indicted the plaintiffs. Thus this Court could no longer prevent an indictment from being returned as originally requested.

Rather than hold that the return of the indictment rendered this part of the case moot, this Court simply shifted its relief to meet the new conditions and entered an order directing the lower court to enjoin the prosecution of the indictment. The plaintiff was not required to take the useless step of filing a new case asking that the indictment be quashed, and await the inevitable disposition of that case before obtaining review by this Court.

The *Dombrowski* case shows that this Court will grant relief based on the case as it exists at the time of its decision rather than on the basis of the facts as they existed at the time the case arose.

If petitioner in this case is forced to go through the useless motion of resubmitting the issue to the trial court and

Court of Appeals, an improper indictment may well be returned and the prosecution well under way, perhaps even on trial, before the question can be re-presented to this Court.

There is a continuing controversy in this case which can only be resolved by this Court.

Conclusion

For the reasons set forth above, we pray that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit so that this case may be reviewed on the merits.

Respectfully submitted,

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